***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-7283

*To be argued by*
REX W. MIXON, JR.

## United States Court of Appeals

FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,

*Plaintiffs-Appellants,*

—against—

SECURITIES AND EXCHANGE COMMISSION, UNITED STATES OF AMERICA as the SECURITIES AND EXCHANGE COMMISSION, NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE, INC., NATIONAL CLEARING CORP.,

*Defendants-Appellees.*

On Appeal From an Order and Judgment of the United States District Court for the Southern District of New York

# BRIEF FOR DEFENDANT-APPELLEE NATIONAL QUOTATION BUREAU, INC.



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January 16, 1976

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SAMUEL H. SLOAN,
SAMUEL H. SLOAN & CO.,

Plaintiffs-
Appellants,

-against-

SECURITIES AND EXCHANGE COMMISSION,
UNITED STATES as the SECURITIES
AND EXCHANGE COMMISSION,
NATIONAL QUOTATION BUREAU, INC.,
BUNKER RAMO CORPORATION,
NATIONAL ASSOCIATION OF SECURITIES
DEALERS, INC.,
DISCLOSURE, INC.,
NATIONAL CLEARING CORPORATION,

Defendants-
Appellees.

Docket No. 75-7283

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BRIEF FOR DEFENDANT-APPELLEE
NATIONAL QUOTATION BUREAU, INC.

## Preliminary Statement

This answering brief is submitted on behalf of the National Quotation Bureau, Inc. ("NQB") in response to plaintiffs' appeal from a decision by the District Court dismissing the amended complaint and denying several motions by plaintiffs. After the parties briefed and argued their respective motions, the District Court denied all motions by plaintiffs and granted

the motions of the several defendants pursuant to Rule 12(c) of the Federal Rules of Civil Procedure to dismiss the amended complaint without leave to replead. NQB respectfully submits that the District Court's decision (which is set forth in the Joint Appendix at pages A300-314)* and the judgment dismissing the amended complaint (A270) should be affirmed in every respect.

The amended complaint** (A26-65), which contains 309 paragraphs with factual and conclusory legal allegations, asserts five counts. Counts I and II (pars. 264-288, A58-61), which are directed against the S.E.C., seek declaratory relief that the Securities Exchange Act of 1934 ("the Exchange Act") and the rules and regulations promulgated thereunder are unconstitutional (par. 265, A58) and damages resulting from certain acts of the S.E.C. (par. 276, A59-60). Count III (pars. 289-298, A61-63) alleges that NQB (and other defendants) have violated Sections 1 and 2 of the Sherman Act and Section 3 of

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* Pages in the Joint Appendix will be cited in this manner.

** In the original complaint (A5-8), plaintiff sued only the Securities and Exchange Commission (the S.E.C."). After the S.E.C. answered the complaint (A9-15), the District Court issued a memorandum and order (A16) which directed plaintiff Sloan, appearing pro se, to serve and file an amended complaint on or before October 2, 1974 or otherwise the action would be dismissed. On or about October 22, 1974, the amended complaint was filed (A26-65) which added Samuel H. Sloan & Co. ("Sloan & Co.") as an additional plaintiff and NQB, the United States of America, Bunker Ramo Corp., National Association of Securities Dealers, Inc., Disclosure, Inc. and National Clearing Corp. as additional defendants.

the Clayton Act. Count IV (pars. 299-304, A63-64) alleges securities law and common law fraud violations by NQB (and other defendants). Count V (pars. 305-309, A64) seeks declaratory relief that plaintiffs do not owe NQB the amount previously paid pursuant to Sloan's bill with NQB.

## Statement of Facts

### Allegations Respecting NQB

The amended complaint (A26-65) contains the following allegations respecting defendant NQB: NQB is the publisher of a national daily stock quotation service, known as the pink sheets, and other publications (par. 9, A27), to which plaintiff Sloan & Co. has been a subscriber at various times (par. 13, A28). The pink sheets published by NQB are daily listings of the names and telephone numbers of all broker-dealers who (1) subscribe to the pink sheets and (2) submit quotation cards indicating an interest in buying or selling a specific over-the-counter security (par. 15, A28). Plaintiffs allege that broker-dealers who submit quotations cards to NQB are given the option of listing a security with or without price quotations (par. 15, A28), but it is "understood" that NQB requires price quotations for initial listings of a security (par. 237, A55).

Plaintiffs allege that NQB's publications, including the pink sheets, are generally regarded as "the authoritative source for all quotations information concerning securities traded over-the-counter" (par. 18, A29). The amended complaint further alleges that NQB "operates a monopoly" by its publications (par. 20, A29) and that "there is no other service or organization in competition with" NQB (par. 19, A29). Plaintiffs allege that NQB discourages broker-dealers from listing a security in its publications if broker-dealers "do not want to buy or sell" that security (par. 22, A29).

Plaintiffs allege that, at various times, Sloan & Co. has caused its name to be listed in NQB's publications in connection with more than 500 separate corporate securities (par. 23, A29).

After Rule 15c2-11 became effective, which was promulgated by the S.E.C. under Section 15(c)(2) of the Exchange Act, NQB developed Form 211 in an effort to cooperate with the S.E.C. in enforcing Rule 15c2-11 (pars. 52-53, A33). The amended complaint alleges that NQB requires a completed Form 211 for listing a security which was not listed during the previous three-day period (pars. 54-55, A33). After receiving a completed Form 211, NQB forwards it to the S.E.C. (par. 56, A34).

Plaintiffs allege that when "Sloan applied for readmission to the pink sheets" in December 1971 (par. 95, A38),

NQB accepted Sloan's application "to become a subscriber to the pink sheets but required that he be listed under the name of Samuel H. Sloan & Co." (par. 98, A38), which was the name of the broker-dealer registered with the S.E.C. (par. 99, A38).

Plaintiffs allege that it is NQB's policy "to require subscribers to the pink sheets to pay their bills six months in advance" (par. 124, A41). From time to time, Sloan was informed by NQB "that he was in arrears in paying his bills" (par. 125, A41), and on or about August 17, 1973, NQB "left Sloan out of the pink sheets" (par. 131, A41). At that time, NQB advised Sloan "that he will not be permitted to go back into the pink sheets until he pays a bill which he now understands to be $1,755.87" (par. 132, A41-42). Although "Sloan does not believe that he owes" the bill, "he is faced with the fact that the National Quotation Bureau, Inc. [NQB] operates a monopoly" (par. 133, A42).

In December 1972, Sloan & Co. was listed in the pink sheets under Pelorex Corporation (par. 154, A45) as the result of a mistake by NQB (par. 155, A45-46).

Plaintiffs allege that when the S.E.C. suspends trading in a security, NQB refuses to list market makers in the suspended security and that, during the past few years, all suspended securities were noted in the pink sheets with the words "suspended by the S.E.C." (par. 168, A47).

The amended complaint alleges that the S.E.C. does not have any authority to regulate NQB (par. 191, A50).

After the S.E.C. lifted the suspension of trading in the securities of Stirling Homex Corporation, plaintiffs submitted quotation cards to NQB for listing prices in that company's common and preferred stock, which NQB returned with the words "Form 211" stamped across them (par. 206, A52). Subsequently, plaintiffs submitted a Form 211 to NQB for listing securities of Stirling Homex Corporation (par. 207, A52).

The amended complaint alleges that NQB has attempted to discourage the practice of broker-dealers "listing securities in the pink sheets on a 'in name only' basis rather than providing price quotations" (pars. 209-210, A52).

Plaintiffs allege that in September 1974, Sloan submitted a Form 211 to NQB for listing without a bid or an asked price - that is, "in name only" - for securities of Triex International Corp. (pars. 232, 235, A55), which NQB forwarded to the S.E.C. (par. 236, A55). Plaintiffs allege that NQB advised Sloan in September 1974 that he would not be permitted to list in the pink sheets for Triex International Corp. unless and until he became a subscriber thereto, by paying his bill with NQB (par. 238, A55).

The District Court Correctly Denied Plaintiffs' Motions

Before considering the District Court's dismissal of the amended complaint's allegations that NQB violated the anti-trust laws and the anti-fraud provisions of the securities laws, we note that the District Court also denied motions by plaintiffs (1) to enjoin NQB from refusing to list plaintiffs' name in the pink sheets under any security and (2) to disqualify George W. Brandt, Jr., from acting as NQB's counsel in this action.

The district Court correctly denied plaintiffs' motion (A264), which was made by order to show cause (A259-260), for injunctive relief to compel NQB to publish plaintiffs' name in the pink sheets under any security, even if the security was suspended from trading by the S.E.C. or the information required by Rule 15c2-11 was unavailable for that security (par. 28, A231-232).

As set forth in the affidavit of David Burnett (A152-154) submitted in opposition to plaintiffs' motion, "NQB began listing Sloan's quotations in the pink sheets" (par. 3, A135) after an outstanding bill was paid, and continued to do so "until on or about December 30, 1974, when it ceased doing so because it was served with a temporary restraining order" issued by the District Court in a proceeding by the S.E.C. "to enjoin plaintiff from violations of the record keeping and net capital rules of the federal securities laws" and "from violating Rule 15c-2-11

promulgated pursuant to Section 15(c)(2) of the Exchange Act" (par. 4, A153). The Burnett affidavit points out (par. 6, A154) that the issues raised by plaintiffs' motion to enjoin NQB are moot in view of the fact that "Since January 15, 1975 NQB has been listing plaintiff's name under various securities." The motion for a preliminary injunction was (par. 6, A154) an effort to subvert an order of the District Court enjoining plaintiffs from further violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-11, which plaintiffs attack in this action as unconstitutional.

In summary, the District Court correctly denied plaintiffs' motion for a preliminary injunction against NQB since plaintiffs' name was in fact appearing in the pink sheets with various securities and there was no showing, nor could there be, that plaintiffs were entitled to the extraordinary relief sought. See, e.g., Checker Motors Corporation v. Chrysler Corporation, 405 F.2d 319, 323 (2d Cir. 1969), cert. denied, 394 U.S. 999; American Metropolitan Ent. of N.Y. v. Warner Bros. Records, 389 F.2d 903, 904 (2d Cir. 1968); Heldman v. United States Lawn Tennis Ass'n, 354 F.Supp. 1241, 1249-50 (S.D.N.Y. 1973).

The District Court correctly denied plaintiffs' motion to disqualify George W. Brandt, Jr., from acting as counsel for NQB in this case (A186, A201). Plaintiffs argue on appeal (Brief, pp. 56-7) that Mr. Brandt's appearance as counsel for NQB in this action violated Canon 9, Ethical Consideration 9-3, of the Code

of Professional Responsibility adopted by the American Bar Association, which provides that "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

On the facts here presented, there is no showing, nor could there be, that Mr. Brandt had "substantial responsibility" in, or indeed any connection with, the subject matter of this action while he was employed during 1968-1971 as an attorney by the S.E.C. Plaintiffs' affidavit submitted in support of the motion to disqualify Mr. Brandt (pars. 15-27, A192-195) makes no showing that he performed any work as an S.E.C. attorney in connection with the issues raised by this lawsuit which was commenced in 1974. Indeed, in one of the cases relied upon by plaintiffs (Brief, p. 56), Control Data Corp. v. International Business Mach. Corp., 318 F.Supp. 145, 147 (D. Minn. 1970), the District Court denied a motion to disqualify counsel, holding that an attorney is not disqualified on the basis of prior government employment which terminated years before and had no connection with the claims raised by the present lawsuit.

Further, the suggestion (made for the first time on appeal) that the law firm representing NQB should be disqualified is without any merit particularly since Mr. Brandt, who is no

longer associated with he law firm,* never possessed, and therefore did not communicate, any information he obtained while employed by the S.E.C. which related in any way to the subject matter of this lawsuit. Indeed, plaintiffs concede (Brief, p. 57 n. 11) that the motion to disqualify Mr. Brandt is moot.

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* Mr. Brandt terminated his assocation with the law firm on September 1, 1975, and having been accepted as an Aspirant for Holy Orders by the Bishop of New York, is currently engaged in seminary training at the Episcopal Divinity School in Cambridge, Massachusetts.

# ARGUMENT

## POINT I

## THE DISTRICT COURT CORRECTLY DISMISSED THE ALLEGATIONS RESPECTING ANTITRUST VIOLATIONS

Plaintiffs allege in Count III of the amended complaint that NQB violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act (Par. 290, A61), for which they seek treble damages (par. 298, A63). The antitrust claims asserted against NQB are based upon the conclusory allegations that NQB "operates a monopoly" by publishing stock quotations known as the pink sheets (par. 291, A61-62; par. 20, A29; par. 133, A42). The amended complaint further alleges (par. 292, A62) that Sloan was injured as a result of NQB's monopoly in publishing the pink sheets because (1) NQB left him out of the pink sheets until he paid his bill (pars. 129-134, A41-42), and (2) the rate charged by NQB for subscription to the pink sheets "places a disproportionate financial burden on the market makers" (par. 21, A62).

As set forth in the affidavit of David Burnett (A149-151) submitted in support of NQB's motion to dismiss the amended complaint, "Since 1971 the National Association of Securities Dealers has provided electronic automated Over-the-Counter quotations to broker-dealers" in competition with the stock quotation services published and sold by NQB (par. 2, A149-150). The Burnett affidavit points out that the subscription rate to NQB's

daily stock quotation service is $60 per month for each subscription (par. 4, A150-151), which is charged uniformly to all broker-dealers. As further set forth in the Burnett affidavit, "At no time has NQB ever required its subscribers to deal exclusively with it in supplying or receiving Over-the-Counter securities quotations" (par. 5, A151).

Alleged Violation of Section 1 of the Sherman Act

The District Court correctly dismissed the alleged violation of Section 1 of the Sherman Act.* There was no showing, nor could there be, that NQB ever restrained trade in publishing stock quotations or conspired to do so.

In establishing a violation of Section 1, courts have uniformly held that there must be a contract, combination or conspiracy between two persons to restrain trade. Here, the amended complaint fails to allege that NQB conspired with any

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* Section 1 of the Sherman Act, 15 U.S.C. § 1, provides as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .
>
> Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor."

person to restrain trade. Plaintiffs concede that a conspiracy between two persons is necessary to establish a violation of Section 1 of the Sherman Act but argue on appeal that the allegation that NQB "cooperated with the S.E.C. in depriving Sloan of his constitutional rights" (par. 302, A63) constitutes an allegation of "conspiracy between the NQB and the S.E.C. sufficient to make out a Sherman Act violation" (Brief, p. 45).

Plaintiffs' strained suggestion that NQB's "cooperation" with the S.E.C. alleges a conspiracy to violate Section 1 of the Sherman Act fails to allege a conspiracy for purposes of establishing a violation of Section 1. First, in attempting to satisfy the requirement for an allegation of antitrust conspiracy under Count III of the amended complaint, plaintiffs have relied upon an allegation in Count IV (par. 302, A63) which deals with alleged securities law and common law fraud.

Further, an actionable wrong under Section 1 can be committed only by two or more "persons" acting in concert to restrain trade. See, e.g., House of Materials v. Simplicity Pattern Co., 298 F.2d 867, 870 (2d Cir. 1962). Indeed, as noted by the court in Six Twenty-Nine Productions Inc. v. Rollins Telecasting, Inc., 365 F.2d 478, 484 (5th Cir. 1966), "It is fundamental that at least two independent business entities are required for violation of Section 1." The S.E.C. is neither a "business entity" nor is it a "person" within the meaning of the Sherman Act which defines a "person" to include only "corp-

orations and associations." Section 8, 15 U.S.C. § 7. In United States v. Cooper Corp., 312 U.S. 600, 607 (1941), the Supreme Court noted that the term "person" in §§ 1, 2 and 3 of the Sherman Act "cannot embrace the United States." Accordingly, plaintiffs' suggestion (made for the first time on appeal) that NQB conspired with an agency of the United States* to restrain trade fails to allege a conspiracy between two "persons" within the meaning of Section 1.

Recently, in Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973), the court dismissed a complaint alleging a Section 1 violation and held that no cause of action under Section 1 is stated against a private party if based upon a conspiracy with a governmental entity. The court in the Saenz case reasoned that the exemption enjoyed by the governmental entity also negates indirectly the action against the private party "since an actionable wrong under section 1 can be committed only by two or more parties acting in concert." 487 F.2d at 1028. See Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F.2d 672, 675 (5th Cir. 1968), cert. denied, 393 U.S. 1000; E.W. Wiggins Airways v. Massachusetts Port Auth., 362 F.2d 52, 55-56 (1st Cir. 1966), cert. denied, 385 U.S. 947; Mine Workers v. Pennington, 381 U.S. 657, 670-2 (1965); Eastern R. Conf. v. Noerr

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* Plaintiffs cannot, by charging conspiracy between NQB and public officials at the S.E.C., convert a claim against the S.E.C. into a federal antitrust case. See, e.g., Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 342 (9th Cir. 1969).

Motors, 365 U.S. 127, 136, 139 (1961); Parker v. Brown, 317 U.S. 341, 350-2 (1943).

Alleged Violation of Section 2 of the Sherman Act

The District Court correctly dismissed the alleged violation of Section 2 of the Sherman Act.* It is well settled that the offense of actual monopolization under Section 2 requires the existence of monopoly power in the relevant market, together with an intent and purpose to exercise that power. United States v. Grinnell Corp., 384 U.S. 563, 570-1 (1966); United States v. duPont & Co., 351 U.S. 377, 389-391 (1956); United States v. Griffith, 334 U.S. 100,107 (1948). Here, there is no allegation, nor could there be, that NQB has monopoly power within the meaning of Section 2, i.e., the power to fix prices in, or to exclude competition from the relevant market.** United States v.

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* Section 2 of the Sherman Act, 15 U.S.C. § 2, provides as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

** The amended complaint seeks to allege a Section 2 violation based upon actual monopolization, alleging that NQB "operates a monopoly" by publishing daily stock quotations (par. 20,

(footnote continued)

Aluminum Co. of Am., 148 F.2d 416, 429-432 (2d Cir. 1945); American Tobacco v. United States, 328 U.S. 781, 811 (1946).

Indeed, as held by the court in granting a motion to dismiss the complaint in Karlinsky v. New York Racing Association, Inc., 310 F. Supp. 937, 940 (S.D.N.Y. 1970), "plaintiffs, on their claim for monopolization under § 2 of the Sherman Act, never allege a relevant market, the activity monopolized or defendants' control of the market. All three allegations are necessary for a proper claim of monopolization [citations omitted]. . . ." Here, as in the Karlinsky case, the District Court properly dismissed the amended complaint for failure to allege a relevant market, the activity monopolized and NQB's control of the market.

To the same effect is Albert H. Cayne Equip. Corp. v. Union Asbestos & Rubber Co., 220 F. Supp. 784, 788 (S.D.N.Y.

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(footnote continued):

A29; par. 133, A42; par. 291, A61-62). The amended complaint makes no effort to allege an attempt to monopolize under Section 2, which requires the existence of a specific intent to control prices in, or exclude competition from, a relevant market. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953); United States v. Aluminum Co. of America, 148 F.2d 416, 431-2 (2d Cir. 1945). Courts have uniformly dismissed allegations respecting a Section 2 violation based upon an attempt to monopolize unless plaintiffs make "some affirmative showing of conduct from which a wrongful intent can be inferred." Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 584 (1st Cir. 1960), cert. denied, 365 U.S. 833; United States v. Chas. Pfizer & Co., 245 F. Supp. 737, 739 (E.D.N.Y. 1965); Bender v. Hearst Corporation, 152 F. Supp. 569, 578 (D. Conn. 1957), aff'd, 263 F.2d 360 (2d Cir. 1959); American TCP Corp. v. Shell Oil Company, 127 F. Supp. 208, 210 (S.D.N.Y. 1955).

1963), where the court, in granting defendant's motion to dismiss allegations respecting an alleged violation of Section 2 of the Sherman Act, pointed out that the complaint failed to show that the defendant "has power to control prices or unreasonably restrict competition in the competitive market for any of the products involved. Indeed, there are no allegations respecting the relevant market at all, much less facts showing that UNARCO [the defendant] has a monopoly, or is reaching out to acquire one, . . . ." 220 F. Supp. at 788. Here, as in the Cayne Equip. Corp. case, the complaint was properly dismissed for not making the necessary showing that NQB violated Section 2.

NQB does not operate a monopoly or possess monopoly power within the meaning of Section 2 of the Sherman Act. Indeed, the fact that a co-defendant successfully launched in 1971* and continues to operate a stock quotation service in competition with NQB's pink sheets strongly supports the District Court's finding that NQB has not monopolized the relevant market in violation of Section 2 of the Sherman Act. See, e.g., American Football League v. National Football League, 323 F.2d 124, 130-1 (4th Cir. 1963).

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* Plaintiffs concede in the amended complaint (pars. 24-28, A30) that an automated stock quotation service was begun in 1971 by defendant National Association of Securities Dealers.

Alleged Violation of Section 3
of the Clayton Act

The District Court properly dismissed plaintiffs' conclusory allegation that NQB violated Section 3 of the Clayton Act.* There was no showing, nor could there be, that NQB has ever required its subscribers to refrain from dealing in the goods or commodities of a competitor.

First, plaintiffs concede (para. 17-19, A29) that NQB publishes and sells quotation services which list bid and asked prices for securities that are traded over-the-counter. NQB does not in the regular course of its business "lease or make a sale or contract for sale of goods, wares, merchandise, mach-

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* Section 3 of the Clayton Act, 15 U.S.C. § 14, provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

inery, supplies, or other commodities" as defined by Section 3 of the Clayton Act. It is well settled that Section 3 does not apply to services, but rather proscribes exclusive dealing agreements in "goods" or "commodities" of a competitor. See, e.g., MDC Data Centers, Inc. v. International Bus. Mach. Corp., 342 F. Supp. 502, 504 n. 2 (E.D. Pa. 1972); United States v. Western Union Telegraph Co., 53 F.Supp. 377, 381 (S.D.N.Y. 1943). Accordingly, for this reason, the District Court correctly dismissed the alleged violation of Section 3 of the Clayton Act.

Further, apart from whether NQB's services in publishing daily stock quotations for securities traded over-the-counter are deemed "goods" or "commodities" within the meaning of Section 3, plaintiffs have made no showing, nor could there be, that NQB has ever required its subscribers to refrain from dealing with stock quotation services provided by competitors. As set forth in the affidavit of David Burnett (A149-151) submitted in support of NQB's motion to dismiss the amended complaint, NQB has never "required its subscribers to deal exclusively with it in supplying or receiving over-the-counter securities quotations" (par. 5, A151). This fact, which plaintiffs concede (pars. 103-104, A39), is particularly significant since the gravamen of a Section 3 violation is the forbidden "condition, agreement, or understanding" of exclusivity, that is, that the purchaser shall not deal in the goods of a competitor of the seller. See, e.g.,

Tampa Electric Co. v. Nashville Co., 365 U.S. 320, 329-330 (1961); International Business Machines Corp. v. United States, 298 U.S. 131, 137 (1936); Susser v. Carvel Corporation, 206 F.Supp. 636, 647 (S.D.N.Y. 1962), aff'd, 332 F.2d 505 (2d Cir. 1964), cert. denied, 379 U.S. 885.

Indeed, in affirming the District Court's order dismissing an alleged Section 3 violation in McElhenny Co. v. Western Auto Supply Co., 269 F.2d 332, 338 (4th Cir. 1959), the court stated that "so far as the complaint shows it [the defendant] exacted no agreement against the handling of competing merchandise. The complaint itself makes clear that the plaintiffs during the period when the asserted understanding was in effect actually handled competitive articles." Similarly, as noted above, the amended complaint concedes (pars. 103-104, A39) that subscribers may list securities in NQB's pink sheets and in NASD's automated stock quotation service. Here, as in the Western Auto case, this Court should affirm the dismissal of the alleged Section 3 violation since there is no allegation, nor could there be, that NQB has ever required any subscriber - including plaintiffs - to deal exclusively with NQB.

## POINT II

### THE DISTRICT COURT CORRECTLY DISMISSED THE ALLEGATIONS RESPECTING SECURITIES LAW AND COMMON LAW FRAUD

Plaintiffs allege in Count IV of the amended complaint that NQB committed securities law fraud in violation of Section 10(b) of the Exchange Act and Rule 10b-5,* as well as common law

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* Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) provides that:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange -
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5, 17 C.F.R. § 240.10b-5, provides that:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security."

fraud, "by refusing to permit Sloan to list his markets in the pink sheets and the yellow sheets, by rejecting quotation cards unless a Form 211 has been provided, and by cooperating with the S.E.C. in depriving Sloan of his constitutional rights" (par. 302, A63).

The District Court correctly dismissed the allegations of Securities law and common law fraud, which it characterized as "a particularly irrational claim against certair defendants" (A311).

The fraud allegations are wholly conclusory in nature and, in addition, fail to comply with Rule 9(b) of the Federal Rules of Civil Procedure which provides that "In all averments of fraud . . ., the circumstances constituting the fraud . . . shall be stated with particularity." This Court has previously held that "mere conclusory allegations to the effect that defendant's conduct was fraudulent or in violation of Rule 10b-5 are insufficient." Shemtob v. Shearson, Hammill & Co., 448 F.2d 442, 444 (2d Cir. 1971). Accord, Segal v. Gordon, 467 F.2d 602, 606-608 (2d Cir. 1972); O'Neill v. Maytag, 339 F.2d 764, 768 (2d Cir. 1964). The District Court's dismissal of the allegations of securities law and common law fraud should be affirmed since they are wholly conclusory and fail to show that fraud or deception was committed in connection with misrepresentations or omissions.

Further, plaintiffs do not begin to make the slightest showing of a violation of Rule 10b-5. There are no allegations, nor could there be, of fraud or deception by NQB "in connection with the purchase or sale of any security" as required by Rule 10b-5. Indeed, there are no allegations that NQB misrepresented or failed to disclose any material facts to plaintiffs, Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1301-1302 (2d Cir. 1973), with the requisite fraudulent intent or scienter, Lanza v. Drexel & Co., 479 F.2d 1277, 1301-1305 (2d Cir. 1973). Further, plaintiffs have made no showing, nor could they, that they relied to their detriment upon any alleged misrepresentation or omission by NQB, List v. Fashion Park, Inc., 340 F.2d 457, 462, 463 (2d Cir. 1965), cert. denied, 382 U.S. 811, which caused damage to them, Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 238-40 (2d Cir. 1974).

In addition, the conclusory allegations that NQB committed common law fraud lack the necessary particularity and fail to state a cause of action. As the New York Court of Appeals recently stated in Jo Ann Homes v. Dworetz, 25 N.Y.2d 112, 119, 302 N.Y.S. 2d 799, 803 (1969), in order to sustain an action in common law fraud "There must be a representation of fact, which is either untrue or known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury." Here, the amended complaint fails to allege any of the necessary elements for a cause of action in common law fraud.

## CONCLUSION

For each of the reasons set forth above, the decision of the District Court should be affirmed.

Dated: New York, New York
January 16, 1976

Respectfully submitted,

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## CERTIFICATE

I, REX W. MIXON, JR., an associate in the law firm of Rogers & Wells, attorneys for defendant-appellee Naticnal Quotation Bureau, Inc., hereby certify that on this 16th day of January, 1976, a true and correct copy of the foregoing brief was served upon counsel for each party by mailing two copies thereof to:

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REX W. MIXON, JR.
/s/ Rex W. Mixon, Jr.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | |
|---|---|
| SAMUEL H. SLOAN<br>SAMUEL H. SLOAN & CO.,<br><br>Plaintiffs,<br><br>-against-<br><br>SECURITIES AND EXCHANGE COMMISSION, UNITED STATES OF AMERICA as the SECURITIES & EXCHANGE COMMISSION, NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE INC., and NATIONAL CLEARING CORP.,<br><br>Defendants. | BRIEF OF DISCLOSURE INC., AS DEFENDANT-APPELLEE |

## PRELIMINARY STATEMENT

Disclosure Inc. ("Disclosure") is defendant-appellee as to that portion of the Judgment (A 270)* rendered below by Judge Thomas P. Griesa dismissing plaintiffs' Amended Complaint against it without leave to replead.

## ISSUES PRESENTED

Did the Court below correctly exercise its discretion to dismiss sua sponte the Amended Complaint as against Disclosure?

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* All references designated "A" are to pages of the Joint Appendix on this appeal.

## THE NATURE OF THE CASE AND PROCEEDINGS BELOW

On June 27, 1974, plaintiff Samuel H. Sloan commenced this action by filing a Complaint against the Securities and Exchange Commission (the "S.E.C.") seeking an order adjudging the Securities Exchange Act of 1934 and the rules promulgated thereunder unconstitutional, and an order directing that Sloan be "permitted to list any security by name in the pink sheets" and "to buy and sell any security." (A 8). At a pretrial conference held on September 18, 1974, plaintiff Samuel H. Sloan was directed to amend his Complaint by October 2, 1974, so as to cure the vagueness and lack of specificity of the original Complaint. (A 16). Pursuant to an Order granting plaintiff Samuel H. Sloan an extension of time in which to file his Amended Complaint, the current appellants Samuel H. Sloan and Samuel H. Sloan & Co. (hereinafter jointly referred to as "Sloan") filed their Amended Complaint on October 22, 1974. The Amended Complaint named six new defendants including Disclosure.

Of the forty pages and three hundred and nine paragraphs of the Amended Complaint, the allegations against and references to Disclosure number six. (A 28, ¶ 11; A 52, ¶ 213; A 53, ¶s 214 and 215; A 61, ¶ 290; and A 63, ¶ 297). As against Disclosure the Amended Complaint purports

to state claims arising under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act (15 U.S.C. §§ 1, 2 and 14 respectively) and seeks damages of $100,000. Disclosure has a contract with the SEC, pursuant to which Disclosure is given the exclusive right to perform mail order duplicating and copying services. The gravamen of plaintiffs' contentions as against Disclosure appears to be that Disclosure's contract with the S.E.C. constitutes a monopoly, the existence of which has injured Sloan because of the allegedly "excessive rates" charged. [A 53]. Disclosure served an Answer [A 113 et seq.] admitting that it has a contract with the Office of Records and Services of the S.E.C., denying liability and asserting the affirmative defense that the Amended Complaint failed to state a claim as to Disclosure upon which relief could be granted.

During a pre-trial conference held on January 10, 1975, a number of defendants indicated their intention to move for dismissal of the Amended Complaint. By January 31, 1975, various motions to dismiss were filed and plaintiff filed various motions. A hearing as to all motions was held on February 14, 1975, and the Court denied all plaintiffs' motions, granted all defendants' motions and dismissed the Amended Complaint as to Disclosure, sua sponte [A 271 et seq.]. Judgment was entered on February 26, 1975. Subsequently, plaintiffs' motion for reargument was denied on February 28, 1975.

## SUMMARY OF ARGUMENT

1. Sloan has failed to allege the basic facts constituting the requisite elements of a cause of action under the stated sections of the Antitrust Laws as against Disclosure.

2. Sloan has not named Disclosure as a defendant for any reason other than to provide a basis for his allegations against the S.E.C. and Sloan concedes this as a fact.

## ARGUMENT

### I. The Amended Complaint Fails to State a Claim Upon Which Relief Can be Granted

If it is conceded, arguendo, that Disclosure is a proper party to the action, the sole issue on this appeal is whether the Court below correctly dismissed the Amended Complaint. We contend that on the law and the facts dismissal was proper on the gounds that the alleged claim is frivolous and that the Amended Complaint fails to state a claim upon which relief can be granted.

The Court below has the power to make and grant motions to dismiss sua sponte premised on the legal inadequacy of a complaint. Literature, Inc. v. Quinn, 482 F.2d 372 (1st Cir. 1973); Robins v. Rarback, 325 F.2d 929 (2d Cir. 1963) cert. denied, 379 U.S. 974 (1965); 5 Wright & Miller, Federal Practice

and Procedure: Civil § 1357, at 593-594. Moreover, where subject matter jurisdiction is premised on Federal questions, a court may on its own motion, dismiss a complaint where that complaint fails to state facts sufficient to invoke jurisdiction under the premised Federal question. Miclau v. Miclau, 58 F.R.D. 207 (D. Puerto Rico 1972); Foster v. National Biscuit Co., 31 F. Supp. 552 (W.D. Wash., N.D. 1940). Such was the situation below and, in the premises, Judge Griesa ruled appropriately.

A. Congressional Mandate Exempts Disclosure's Contract with the SEC from the Antitrust Laws

The antitrust laws are aimed at private, not governmental action. Parker v. Brown, 317 U.S. 341, 350-352 (1943); E. W. Wiggins Airways Inc. v. Mass. Port Authority, 362 F.2d 52, 55-56 (1st Cir.), cert. denied, 385 U.S. 947 (1966). Thus, when "person" is defined under these laws, the United States government is not included (see 15 U.S.C. §§ 8, 12). Consequently, when government agents and agencies act within the scope of their authority and pursuant to government policy or legislative enactment, the resultant contracts, etc. are immune from potential liability under the antitrust laws. Parker v. Brown, supra; Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 576-577 (10th Cir. 1961), cert. denied sub nom Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962).

Disclosure's contract with the S.E.C. states on its face that it was entered into pursuant to the provisions of 41 U.S.C. § 252(c)(10) relating to the procurement by the government of property and services by purchase and/or contract. In addition, 41 U.S.C. § 252(a), as it then existed, provided in relevant part as follows:

> "The provisions of this chapter shall be applicable to purchases and contracts for property or services made by -
>
> (1) The General Services Administration, for the use of such agency or otherwise; or
>
> (2) any other executive agency (except the departments and activities specified in section 2303(a) of Title 10) in conformity with authority to apply such provisions delegated by the Administrator in his discretion. Notice of every such delegation of authority shall be furnished to the General Accounting Office."

As the Section of Antitrust Law of the American Bar Association stated in its recent commentary Antitrust Law Developments (1975):

> "When ... a state by valid legislative action adopts a policy restricting competition in an industry vital to its interests and substitutes a system of public regulation which specifically requires a trade restraint, the regulatory program does not conflict with the Sherman Act." (at 408).

Clearly, in the instance of the acquisition of products and services by governmental agencies, Congress recognized the necessity of prescribing the means by which contracts for such goods and services should be entered into. Hence,

by valid legislation, Congress authorized the making of the S.E.C.-Disclosure contract and thereby created an antitrust exemption for Disclosure.

### B. Disclosure's Contract with the S.E.C. Does Not Constitute an Unlawful Restraint of Trade

Assuming, arguendo, that Disclosure's contract with the S.E.C. is not exempt from the antitrust laws, appellants have failed to allege facts constituting an illegal and prohibited restraint of trade. In the absence of such allegations, the Complaint against Disclosure must fall.

Section 1 of the Sherman Act (15 U.S.C. § 1) reads, in pertinent part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal ...."

The operative words of this section are " ... in restraint of trade or commerce" and it has been held that the anti-competitive effect and the surrounding circumstances of allegedly violative agreements are the determinative elements of this section. Thus, Section 1 of the Sherman Act does not prohibit all agreements which may restrain trade -- every contract being in restraint of trade -- but only those which are unreasonable by virtue of having a pernicious

effect on competition and which have no redeeming virtue. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); Standard Oil Co. v. U.S., 221 U.S. 1 (1911). Therefore, the Amended Complaint must also allege that the restraint of trade complained of is unreasonable and must further demonstrate an alleged anticompetitive effect.

Sloan has not asserted that the activities of Disclosure pursuant to its contract with the S.E.C. are in restraint of trade much less an unreasonable restraint of trade, nor has Sloan alleged that potential or actual competitors have been hindered or otherwise barred from lawful competition. Appellants themselves concede that the S.E.C. makes its materials available to the public for reproduction in its own local offices -- and at a lower price! Appellants' Brief, p. 46. In fact, those who file various documents with the S.E.C. are the entities with the ultimate control over those materials. Disclosure's contractual rights have no effect whatsoever on the ability of appellants to obtain copies of the desired materials from their original source -- those who filed them with the S.E.C. in the first instance. In sum, Disclosure's contract with the S.E.C. is roughly analogous to an exclusive agency or dealership. Such arrangements are not

per se illegal and have been held valid where other sources of supply are open to the complaining party and where that party is not the target of a conspiracy of his competitors. Beckman v. Walter Kidde & Co., 316 F. Supp. 1321 (E.D.N.Y. 1970), aff'd, 451 F.2d 593 (2d Cir. 1971), cert. denied, 408 U.S. 922 (1972); see also Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1957). In the case at bar, the result should be no different.

C. Disclosure's Contract with the S.E.C. Does Not Constitute Unlawful Monopolization

Section 2 of the Sherman Act (15 U.S.C. § 2) provides in pertinent part as follows:

> "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor ..."

This section therefore proscribes the process of monopolization, conspiracies to monopolize and attempts to monopolize.

Conceding, arguendo, that Disclosure's contract with the S.E.C. may constitute a monopoly, appellants have still failed to allege the requisite elements of a valid cause of action under this section. The United States Supreme Court has held that the offense of monopolization consists not merely of the possession of monopoly power but also

the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident" United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966).

Moreover, monopoly power as defined under Section 2 has been held as "the power to control market prices or exclude competition," United States v. Grinnell Corp., supra, at 571, "coupled with a purpose or intent to do so." United States v. Paramount Pictures, Inc., 334 U.S. 131, 174 (1948). Hence, in American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946), the United States Supreme Court stated:

> "... the material consideration in determining whether a monopoly exists is not that prices are raised and that competition is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

Since Disclosure operates under a contract with the S.E.C. which is finite in time, it, therefore, has no power to raise prices or to exclude competition save by the specific terms* of that contract. Moreover, in order to measure any ability to lessen or destroy competition, it is necessary to determine the relevant market -- either product or geographic -- over which

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* Appellants in fact concede that it is the S.E.C. which sets the rates of which they make complaint [Appellants' Brief, p. 46].

the alleged monopoly power exists. Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177 (1965).

Appellants here have failed to allege what the courts have held to be three necessary allegations of a claim of monopolization: a relevant market, Disclosure's control of that market or even the activity monopolized. United States v. Grinnell Corp., supra; U.S. v. E. I. Du Pont De Nemours & Co., 351 U.S. 377, 389, 394 (1956); Karlinsky v. New York Racing Ass'n, Inc., 310 F. Supp. 937 (S.D.N.Y. 1970). While the failure to allege a relevant market may not be, in and of itself, a fatal defect in the Amended Complaint furnishing sufficient grounds for dismissal, the absence of any allegation of power to control prices and exclude competition has been held to be so fatally defective. Keco Industries Inc. v. Borg-Warner Corp., 334 F. Supp. 1240, 1245-1246 (M.D. Pa. 1971). Taken cumulatively, however, all the pleading deficiencies mandate, much less allow, dismissal of the complaint and affirmance of the judgment of the lower court.

### D. Disclosure's Contract with the S.E.C. Is Not Within the Parameters of Section 3 of the Clayton Act

Section 3 of the Clayton Act (15 U.S.C. § 14) reads as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares,

> merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

By its terms, that section prohibits restrictive and exclusive dealing agreements which restrict competition by means of requiring the buyer to agree not to use the goods or commodities of the seller's competitors. Merely stating the provisions of the section demonstrates its inapplicability to the facts presented in the complaint herein. Moreover, it has been held that this section, by its terms, is inapplicable to agreements for services. MDC Data Centers, Inc. v. International Business Machines Corp., 342 F. Supp. 502, 504 n.2 (E.D. Pa. 1972). Since Disclosure's contract with the S.E.C. is admittedly one for services, the Amended Complaint fails to state a cause of action under the Clayton Act and must fall.

E. Appellants Lack Standing to Sue

Section 4 of the Clayton Act (15 U.S.C. § 15) provides in relevant part as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent ..."

In order for Sloan to properly sue and claim damages from Disclosure under this Section, they must allege that they have sustained injury in their business or property as a proximate result of the particular acts of which they complain. This Court has held that in order to have standing under this section a plaintiff must be within the "target area" of the alleged violations; i.e., plaintiff must be the person against whom the conspiracy is aimed, such as a competitor of the person sued. Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied 406 U.S. 930 (1972); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971). The injury must also be a direct rather than incidental result of the alleged antitrust violation. SCM v. Radio Corp. of America, 276 F. Supp. 373 (S.D.N.Y. 1967), aff'd, 407 F.2d 166 (2d Cir.), cert. denied, 395 U.S. 943, reh. denied, 396 U.S. 869 (1969).

Sloan did not allege that they are the persons against whom the alleged violations are aimed. Nor do they allege that they are engaged in the business of reproducing materials or documents. [A 26-27, ¶s 3 & 4].

Indeed, Sloan did not ever allege that he has suffered any damages by reason of the contract or its allegedly "excessive rates." Appellants allege only the existence of what they characterize as "excessive rates." Hence, appellants have no standing to bring suit against Disclosure by reason of alleged violations of the antitrust laws and the Amended Complaint was properly dismissed.

## II. Appellants Concede That Disclosure Is Not a Real Party Defendant

One basic and undeniable fact of this appeal is that Sloan concedes in his brief to this Court that it is the S.E.C. alone against which he allegedly has a complaint. While stating that Disclosure is not a "tag along" party, Sloan proceeds to demonstrate by his argument that this is precisely the case. Sloan states that Disclosure's activities (performing its contractual obligations?) "constitute an intergal (sic) part of a reprehensible scheme to expand the power of the S.E.C. at the expense of individuals such as Sloan." Appellants' Brief, p. 46. Moreover, Sloan attacks the S.E.C., not Disclosure, for allegedly legislating by requiring the payment of a fee of $.15 per page for the duplication of documents. Hence, it appears that it is not even the amount of the fee to which Sloan takes exception but the existence of any fee

at all! This argument is immediately followed by the assertion of the importance of appellants' case against Disclosure, buttressed by the recitation of the undisputed facts that the reproduction of all the documents annually filed with the S.E.C. amounts to substantial sums. Clearly, the end result of this reasoning is nonsensical. Sloan would apparently have the S.E.C. maintain its own duplicating facilities to provide copies to the public -- presumably free of charge to the recipient but at the taxpayer's cost. Regardless of whether Sloan's desires are practical or reasonable, the fact that the S.E.C. does not operate in accordance with them, but by means of a contract with Disclosure, is not a proper basis for a claim against Disclosure.

Finally, Sloan admits that the only reason Disclosure is a party to this action is that the "broad thrust of this lawsuit involves the question of the constitutionality of the power of the S.E.C. to regulate and suspend trading in securities." Appellants' Brief, p. 47. By a grossly circuitous line of reasoning, appellants then arrive at the conclusion that Disclosure is a necessary party because it provides the means of distributing to the public information filed with the S.E.C., which distribution is the purpose of the S.E.C.'s filing requirement. Ultimately, appellants' claim is that Disclosure is a named defendant because it

would be adversely affected by a court ruling in favor of appellants. This argument of the "necessity" of Disclosure as a party was raised in appellants' motion for reargument in the Court below. Judge Griesa rejected that argument.

The fact is that of appellants' sixty-eight page brief only approximately four pages are devoted to Sloan's claims against Disclosure, and in those pages [Appellants' Brief, pp. 45-48] appellants fail to set forth any substantive claim. This fact is a product of neither inadvertence nor lack of ingenuity, but rather indicates the correctness of Judge Griesa's finding that the claims against Disclosure were frivolous and warranted dismissal of the Amended Complaint.

## CONCLUSION

The judgment of the District Court should be affirmed as to Disclosure Inc.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------X

SAMUEL H. SLOAN
SAMUEL H. SLOAN & CO.,

Plaintiffs-Appellants,

-against-

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants-Appellees.

----------X

AFFIDAVIT OF SERVICE BY MAIL

75-7283

STATE AND COUNTY OF NEW YORK ) ss.:

DOMINICK DAVID MONTEVERDI, SR., being duly sworn, deposes and says: that he is over the age of 21 years, not a party to this action and is employed by Willkie Farr & Gallagher, attorneys for Defendant-Appellee, Disclosure, Inc.

That on the 16th day of January, 1976, he served the annexed Brief of Appellee, Disclosure, Inc. upon the attorneys listed below by depositing two copies thereof securely enclosed in postpaid wrappers in a Post Office Box regularly maintained by the United States Postal Service at 1 Chase Manhattan Plaza, New York, N.Y., .0005, directed to each of said attorneys at the addresses designated by them upon the preceding papers in the proceeding:

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Dominick David Monteverdi Sr
Dominick David Monteverdi, Sr.

Sworn to before me this
16th day of January, 1976

Notary Public

HENRY J. CASSIDY
Notary Public, State of New York
No. 43-5646500
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1976

Sir:

Take notice that the within is a copy of

.....

which was duly made, entered and filed in the office of the Clerk of the.....

.....on the .....

day of..... 19 .....

Dated, New York, N. Y. ..... 19 .....

Yours, etc.,

WILLKIE FARR & GALLAGHER

Attorneys for .....

Office and Post Office Address
1 Chase Manhattan Plaza
New York, N. Y. 10005

To:

Sir:

Take notice that the within

.....

will be presented for settlement
at.....Term, Part .....
of the.....Court at the
.....Court House, in the
.....of....., County of
.....on the .....day of
.....19....., at.....
o'clock.....M.
Dated New York, N. Y....., 19.....

Yours, etc.,

WILLKIE FARR & GALLAGHER

Attorneys for .....

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To:

FOR THE SECOND CIRCUIT

71-7283

SAMUEL H. SLOAN
SAMUEL H. SLOAN & CO.,

Plaintiffs-
Appellants,

-against-

SECURITIES AND EXCHANGE COMMISSION,
et al.,

Defendants-
Appellees.

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Due and sufficient service of the within

.....

is hereby admitted.

Dated New York, N.Y.